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THE NATION

# Immigrant Pleas Crushing Federal Appellate Courts

## As caseloads skyrocket, judges blame the work done by the Board of Immigration Appeals.

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May 2, 2005

Immigrants fighting to stay in the United States are flooding the federal appellate courts with cases, creating huge backlogs and fundamentally changing the character of the second-highest courts in the nation.

The deluge reflects growing dissatisfaction with the nation's immigration courts, and attorneys representing asylum-seekers and others say they have little choice but to appeal to the federal judiciary.

The trend is nationwide, federal records show, but bearing the brunt of this sudden surge is the San Francisco-based U.S. 9th Circuit Court of Appeals. In the year ending June 30, 2001, the immigration caseload was 965. It skyrocketed to 4,835 cases in the year ending in June 2004.

"Three years ago, immigration cases were 8% of our calendar," said 9th Circuit Judge Michael Daly Hawkins. "Today, as we speak, that percentage is 48%."

The 9th Circuit is the nation's largest federal appellate court and has long had a liberal reputation, but its immigration caseload is largely driven by the region it serves: California, eight other states and two territories. The court's 24 judges consider myriad cases that must now compete with the ever-growing immigration backlog.

"There are only so many judges available to hear and decide cases," said 9th Circuit clerk Cathy Catterson, adding that appellate cases used to take about six months to complete; now they can take about nine months.

"We feel overloaded by this problem," said Dorothy Nelson, another 9th Circuit judge. "It's just extraordinary. I've been on the court for 25 years, but I've never seen a rush ... overwhelming us like this. Frankly, the immigration system needs to be reformed."

The cases inundating the circuit courts are coming from the Board of Immigration Appeals, a quasi-judicial body appointed by the U.S. attorney general.

The mounting workload has prompted federal judges to criticize the BIA's work in uncharacteristically blunt terms.

"The BIA's decision was nonsensical," a 9th Circuit panel wrote in March of an asylum case. "Not only was the BIA's opinion an example of sloppy adjudication, it contravened considerable precedent."

Many people caught entering the country illegally never appear in the nation's 53 immigration courts, which primarily deal with those hoping to obtain asylum or avoid deportation.

In those courts asylum-seekers testify about persecution they suffered in their home countries, hoping a judge will allow them to stay here. Other immigrants fight to remain in the United States after a criminal conviction makes them eligible for possible deportation.

Still others petition immigration courts to change their residency status from temporary to permanent. Petitioners who disagree with an immigration judge's ruling may appeal to the Virginia-based BIA.

The sharp rise in BIA decisions being appealed to the circuit courts has been triggered by several factors:

- Overall immigration is up, increasing the pool of potential petitioners. According to an analysis of census figures by the Washington-based Center for Immigration Studies, the immigrant population, both legal and illegal, reached more than 34 million in March 2004 — an increase of 4.3 million just since 2000.
- Tougher enforcement of immigration laws has also funneled more cases into the system.
- The BIA's duties were curtailed and its size halved, from 23 to 11 members, as a cost-saving measure in 2002.

The caseload now clogging the federal courts was, in large part, an unintended consequence of attempts to ease a backlog at the BIA, which had 57,200 cases pending in 2002.

That year, then-Atty. Gen. John Ashcroft issued policies intended to clear the logjam, saying the backlog "gravely undermines the enforcement of our country's immigration laws."

To speed up the process for certain cases, Ashcroft directed the BIA to either approve cases or send them back to immigration courts outright. In the past, the BIA often researched and wrote new opinions.

This "streamlined approach" was designed to expedite matters for aliens entitled to stay in the country, said officials at the Executive Office of Immigration Review, a unit of the Department of Justice.

The officials, who responded to questions in writing, added that the reforms also hastened the deportation of illegal immigrants, "some of whom posed a threat to our nation."

In the wake of Ashcroft's reforms, the BIA increasingly issued one-sentence rulings endorsing or remanding immigration judges' decisions. These "affirmances without opinion" made up 6% of the board's decisions in 2001 and a third of all decisions three years later.

At the BIA, the reforms are indeed speeding up the disposition of cases, but the faster pace has been accompanied by more decisions siding with the government, records show. Five years ago, the BIA ruled in favor of immigrant appeals 9% of the time. By 2003, immigrants won their appeals 6% of the time.

Critics say the BIA reforms have hobbled the agency and eroded an important level of review for immigration cases.

"Why even have a BIA? You might as well go from the judge to the [circuit] court and save the person the money of having to go to the BIA," said Los Angeles immigration lawyer Carl Shusterman.

One statistic sums up the growing dissatisfaction with the BIA. Before the reforms, about 5% of board decisions were appealed to circuit courts, according to immigration officials. Now 25% reach the federal courts.

Raul Godinez, chairman of the Southern California chapter of the American Immigration Lawyers Assn., echoed that view. "Individuals want to know that they've had their day in court, and they want to make sure they've been understood," he said.

Some immigration attorneys acknowledged that the generally liberal reputation of the 9th Circuit and its willingness to challenge rulings by immigration judges and the BIA often influenced their decision to appeal to the court.

But more important are a case's merits, a client's willingness to continue a legal fight and the 9th Circuit's expertise, said Edward W. Pilot, a Beverly Hills-based immigration lawyer.

"I have much more confidence in the wisdom and decision-making process of the 9th Circuit justices than I do in the Board of Immigration Appeals judges," Pilot said.

Jurists, legal scholars and immigration lawyers interviewed argued that the BIA reforms have come at the expense of the nation's circuit courts.

The Executive Office of Immigration Review acknowledged that view:

"Some have argued that the Board's use of affirmances without opinion is the cause of the increase in the rate of appeal, because aliens are not satisfied with those decisions and feel they have been given short shrift in the administrative review process," wrote agency officials.

Recently appointed Atty. Gen. Alberto R. Gonzales acknowledged that immigration cases were beginning to bog down the federal judiciary. In a speech before Stanford University's Hoover Institution in March, he said federal courts were "straining under the weight of an immigration litigation system that is broken."

Gonzales urged Congress to propose legislation to address the problem — a remark that prompted a rebuke from Sen. Patrick J. Leahy of Vermont, the ranking Democrat on the Judiciary Committee.

In a written statement, Leahy said the problem was caused by Ashcroft's "misguided restructuring of the Board of Immigration Appeals."

One result of the changes, according to circuit court officials, is a new role for the appellate courts. The BIA's reliance on one-sentence opinions has forced circuit courts to spend more time researching and deliberating the immigration cases that come to them, court officials say.

"The BIA used to set forth reasoning as to why they affirmed the immigration judge," said Catterson, the 9th Circuit clerk. "Now if they affirm, you often don't know what the grounds are. Basically, the appeals courts now have to serve in the role of the BIA."

That practice has laid bare the deficiencies of immigration courts, where overloaded administrative law judges often serve as their own clerks — recording their own hearings, doing their own research and often ruling from the bench.

"Immigration judges have begun to look really bad in the circuit court decisions because the BIA used to review things. We were encouraged to do things in a short-and-dirty manner, knowing that the BIA would return them if we went too far," said San Francisco-based Immigration Judge Dana Leigh Marks, president of the 220-member immigration judges union.

"Now, the BIA is issuing all of these affirmances without opinion and we have no resources to do a top-notch job from the beginning," Marks said. "We're like the guy behind the curtain in 'The Wizard of Oz,' for God's sake."

Several circuit courts have departed from their usual decorum to blast the BIA for failing to explain decisions or correct mistakes by immigration judges.

A ruling by a 9th Circuit three-judge panel in March had this to say about a BIA ruling involving a man who claimed he fled ethnic persecution in Guatemala: "When the agency's only explanation of its final action is incoherent, we may not substantively review it without violating basic principles of judicial review."

At a conference attended by federal appellate judges, BIA members and other immigration law officials last year, Hawkins, of the 9th Circuit, suggested that judges in his court had become so frustrated with the poor quality of many immigration judge decisions that they had considered shaming them into better practice.

"The largest applause line I got the entire time I spoke was when I said our circuit was considering identifying [poor performing] immigration judges by name in our opinions," Hawkins recalled.

Circuit court and immigration judges interviewed estimated that the appeals courts are now reversing a greater proportion of cases than before the BIA restructuring, although statistics on the issue have not been compiled.

"The conventional wisdom is that the elimination of one level of review has resulted in more remands," said Mary Schroeder, chief justice of the 9th Circuit.

The BIA, however, is cutting back on its workload.

That 57,200-case backlog faced by the BIA a few years ago was reduced, as of March, to 32,100. It's a workload the agency views as manageable.

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Immigration appeals soar

Since reforms to the Board of Immigration Appeals in 2002,

appeals to the U.S. Circuit Courts have greatly increased. The U.S. 9th Circuit OF Appeals bears the

biggest burden.

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## Immigration appeals

More than a third of the 13,682 appeals filed at the 9th Circuit Court between June 2003 and June 2004 were from the BIA. The BIA caseload is even higher now, officials say.

All other appeals 65%

BIA appeals 35%

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## Moving through the system

The steps a case takes as it moves through the immigration appeals system:

### 1. Immigration court

Many people go to immigration court to seek asylum or to avoid deportation. Others hope to change their visa status so they can stay in the United States longer. If judge rejects claim, applicant is ordered deported.

### 2. Board of Immigration Appeals

Immigrant can petition the BIA to review case. If BIA agrees with judge, immigrant can appeal the decision.

### 3. U.S. Court of Appeals

If court decides to hear case and rules in immigrant's favor, case is sent back to immigration judge to make corrections and issue a new ruling.

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Sources: Administrative Office of the U.S. Courts, Executive Office of Immigration Review, <http://www.uscourts.gov> . Graphics reporting by Solomon Moore

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*Times staff writer Doug Smith contributed to this report.*

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